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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

THE BALTIMORE AND OHIO R. CO., *et al.*, *Appellants*,
v.
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees*. } No. 143

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,
v.
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees*. } No. 576

On Appeal From the United States District Court for the Southern District of California

MEMORANDUM ON BEHALF OF APPELLEES SOUTHERN PACIFIC COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND OTHERS SUGGESTING THAT THE CAUSE IN NO. 143 IS MOOT AND THAT THE CAUSE IN NO. 576 IS PARTIALLY MOOT.

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February 15, 1966

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MEMORANDUM ON BEHALF OF APPELLEES SOUTHERN PACIFIC COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND OTHERS SUGGESTING THAT THE CAUSE IN NO. 143 IS MOOT AND THAT THE CAUSE IN NO. 576 IS PARTIALLY MOOT.

Appellees Southern Pacific Company, The Denver and Rio Grande Western Railroad Company and other plaintiffs and intervener plaintiffs in the court below as listed in Appendix A file this Memorandum to advise the Court of facts occurring since the taking of these appeals, which render the appeal in No. 143 completely moot and the appeal in No. 576 partially moot,

thus wholly or partially depriving this Court of jurisdiction to hear these appeals.

These cases, together with No. 159, are appeals (by eastern railroads in No. 143, and by the United States and the Interstate Commerce Commission in No. 576) from the final judgment of a three-judge Federal District Court for the Southern District of California, on suit of mountain-Pacific railroads, including these Appellees, setting aside orders of the Interstate Commerce Commission which prescribed new divisions of joint rail rates on transcontinental freight traffic. The Commission prescribed new divisions of joint rates on eastern and mountain-Pacific transcontinental freight traffic substantially more favorable to the eastern lines than the existing divisions. New divisions were also established on transcontinental traffic originating and terminating in midwest territory and for midwestern lines participation as intermediate carriers of traffic moving between eastern (official) and mountain-Pacific territory. These divisions benefited the great majority of the midwestern lines, and nine of them have appealed in No. 159 from the setting aside of the Commission's order insofar as it relates to their divisions. The appeal of the eastern railroads in No. 143 is from the setting aside of the Commission's order insofar as it affects their divisions, and the appeal of the United States and the Interstate Commerce Commission is from the setting aside of the entire order relating to both eastern and midwestern railroad divisions.

The changes in divisions prescribed by the Commission would have become effective on July 1, 1963, but the District Court entered interlocutory injunctions restraining the operation of the Commission's orders subject to conditions protecting the interests of the eastern and midwestern railroads in the event the

orders were ultimately upheld. Thereafter the District Court entered its judgment setting aside the Commission's orders and remanding the cause to the Commission for further proceedings, from which judgment these three appeals were taken to this Court.

After these appeals had been docketed in this Court all of the eastern railroad Appellants in No. 143 and the Appellees, including those on behalf of whom this Memorandum is filed, entered into a settlement agreement dated September 29, 1965,[1] copy of which is attached as Appendix B to the memorandum, suggesting mootness filed by the other Appellees. This agreement recited that the three appeals had been taken to this Court and that "the parties desire, so far as they can, to compromise, settle and dispose of such Docket 31503 litigation before the courts and the Commission, the divisions dispute involved therein, and certain related disputes." The agreement provides new divisions on transcontinental traffic, effective as of September 1, 1965, generally higher for the eastern railroads than those previously in existence but somewhat lower than those prescribed by the Commission. All parties waived any right to retroactive payments under the conditions set forth in the interlocutory injunctions entered by the District Court.

Pursuant to the terms of the settlement agreement the eastern railroads and the Appellees, including those on behalf of whom this Memorandum is submitted, filed a joint petition before the Interstate Commerce Commission on October 20, 1965, attaching their settlement agreement and requesting that the Commission

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[1] Chicago & Eastern Illinois Railroad Company entered into a substantially similar agreement with the same Appellees on November 19, 1965, Appendix C to Memorandum suggesting mootness filed by other Appellees.

vacate its orders in Docket No. 31503 insofar as those orders prescribed divisions covered by that agreement. By order of January 7, 1966,[2] the Commission granted this petition and vacated its previous orders in all respects necessary to allow Appellees, including those on behalf of whom this Memorandum is filed, and the eastern railroad Appellants in No. 143, to continue in effect their agreement to apply divisions in lieu of those previously prescribed by the Commission.

The result is that the orders of the Commission, insofar as they relate to the divisions of the eastern railroads, which were the partial subject of the suit in the District Court, which are the complete subject of the appeal in No. 143 and which are the partial subject of the appeal in No. 576, are no longer in existence.

It is well settled that suits in the Federal courts involving orders of the Interstate Commerce Commission, or appeals therefrom, must be dismissed as moot for lack of jurisdiction when, through intervening action of the parties, of the legislature or of the Commission, the order under consideration has ceased to have any practical effect. This doctrine arises in part from the constitutional theory that federal judicial power extends only to actual "cases or controversies" and in part from the various statutory provisions limiting the jurisdiction of the Federal courts to review only actual orders of the Interstate Commerce Commission. *Cf. Rochester Tel. Corp.* v. *United States,* 307 U.S. 125, 132 (1939). Thus 28 U.S.C. § 1336 gives the District Courts "jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission;" 28 U.S.C. § 2325 requires that any interlocu-

[2] Attached as Appendix D to Memorandum filed by other Appellees suggesting mootness.

tory or permanent injunction restraining the operation of any "order of the Interstate Commerce Commission" shall be granted only by a three-judge federal district court; and 28 U.S.C. § 1253 gives the Supreme Court direct appeal jurisdiction from an order granting or denying an interlocutory or permanent injunction "in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Good examples of cases where this Court has found mootness with respect to litigation involving orders of the Interstate Commerce Commission, where, because of intervening events, the order involved had ceased to have any practical effect, are the following: *United States* v. *Alaska S.S. Co.*, 253 U.S. 113 (1920); *Minneapolis R.R.* v. *Peoria Ry.*, 270 U.S. 580 (1926); and *Atchison, Topeka & Santa Fe Ry.* v. *Dixie Carriers*, 355 U.S. 179 (1957). In the *Alaska Steamship* case, after the Commission had been enjoined from requiring rail and water carriers to use certain forms of bills of lading in domestic and export transportation, Congress passed an act requiring changes in both forms of bills of lading. In the *Minneapolis* case it was held the courts had no jurisdiction to enforce an order of the Commission, where the Commission had subsequently issued an order dismissing, without reservation, the complaint upon which the earlier order was completely based, since the subsequent order was found necessarily to have rescinded the former order. In the *Dixie Carriers* case, this Court found mootness, apparently because of a superseding Commission order, in an appeal from a District Court decision in *Dixie Carriers* v. *United States* (D.C.S.D. Tex., 1956), 114 F. 844, setting aside an earlier Commission order.

In the light of these precedents there is no doubt that the appeal in No. 143 has become completely

moot and that the appeal in No. 576, insofar as it relates to the divisions of the eastern railroads, has also become moot. Under such circumstances this Court has held that the established practice is to vacate the judgment below and remand with direction to dismiss. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

Wherefore, it is requested that this Court enter an order in No. 143 and in No. 576 vacating the judgment of the district court and remanding the cases to that court, with directions to dismiss the complaints as moot, insofar as the judgment below and the complaints are directed to portions of orders of the Interstate Commerce Commission which have been vacated by that Commission in its order dated January 7, 1966.

Respectfully submitted,

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February 15, 1966

APPENDIX A

List of Appellees on Whose Behalf This Memorandum Suggesting Mootness Is Filed

Amador Central Railroad Company
The Arcata and Mad River Rail Road Company
California Western Railroad
Camino, Placerville & Lake Tahoe Railroad Company
The Denver and Rio Grande Western Railroad Company
Holton Inter-Urban Railway
Inter-California Railway Company
Klamath Northern Railway Company
McCloud River Railway Company
Magma Arizona Railroad Company
Nacozari Rail Road Company
Northwestern Pacific Railroad Company
Pacific Electric Railway Company
Petaluma and Santa Rosa Railroad Company
San Diego & Arizona Eastern Railway Company
Santa Maria Valley Railway Company
Sierra Railroad Company
Southern Pacific Company
Tijuana and Tecate Railway Company
Trona Railway Company
Tucson, Cornelia and Gila Bend Railroad Company
Ventura County Railway Company
Visalia Electric Railroad Company
Yreka Western Railroad Company